



Dear Zach,

Thank you for your email. Please confirm, in response to my email of 8/3, that State D also present Mr. White on the topics raised by his declaration in paragraphs 6-17.

Thanks again,

Nina Perales
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 Mexican American Legal Defense
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 San Antonio, TX 78205
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From: Zachary Berg <Zachary.Berg@oag.texas.gov>

Sent: Tuesday, August 8, 2023 5:31 PM

To: Paikowsky, Dana (CRT); Stewart, Michael (CRT); Will Wassdorf; Kathleen Hunker; Nina Perales; Jameson Joyce; Ryan Kercher; Ethan Szumanski; David Bryant; Johnathan Stone; Sharon Murray; Jessica Yvarra

Cc: berryp@brennan.law.nyu.edu; monzona@brennan.law.nyu.edu; morales-doyles@brennan.law.nyu.edu; sandersr@brennan.law.nyu.edu; singhj@brennan.law.nyu.edu; sweren-beckere@brennan.law.nyu.edu; jason.kanterman@friedfrank.com; kevin.zhen@friedfrank.com; michael.keats@friedfrank.com; Rebecca.Martin@friedfrank.com; Fatima Menendez; Julia Longoria; liz.ryan@weil.com; megan.cloud@weil.com; Freeman, Daniel (CRT); Yun, Jennifer (CRT); Dellheim, Richard (CRT); Soo-Tim, Tiffani (CRT); Putnam, Lauren (CRT); asavommatthews@elias.law; cdodge@elias.law; dlorenzo@elias.law; Kenneth Parreno; erodriguezarmenta@elias.law; mjones@elias.law; mmcqueen@elias.law; mogara@elias.law; nbaron@elias.law; oalerasool@elias.law; unkwonta@elias.law; jvattamala@aaldef.org; pstegemoeller@aaldef.org; rpatel@aaldef.org; slorenzo-giguere@aaldef.org; acepedaderieux@aclu.org; asavitzky@aclu.org; dcampbell-harris@aclu.org; smizner@aclu.org; aharris@aclutx.org; ESaldivar@aclutx.org; tbuser-clancy@aclutx.org; skumar@aclutx.org; lromano@drtx.org; lsnead@drtx.org; mmcnaire@drtx.org; phofer@drtx.org; abernstein@jenner.com; apeterson@jenner.com; atrepp@jenner.com; gwashingt@jenner.com; jamunson@jenner.com; chris@texascivilrightsproject.org; hani@texascivilrightsproject.org; schen@texascivilrightsproject.org; veronikah@texascivilrightsproject.org; zachary@texascivilrightsproject.org; bradley.prowant@stoel.com; elijah.watkins@stoel.com; jackie.franolich@stoel.com; laura.rosenbaum@stoel.com; mark.bieter@stoel.com; wendy.olson@stoel.com; bwilliams@naacpldf.org; jholmes@naacpldf.org; ksadasivan@naacpldf.org; usheikh@naacpldf.org; vgenecin@naacpldf.org; dlopez@reedsmith.com; kbroughton@reedsmith.com; kpippin@reedsmith.com; sarah.stewart@reedsmith.com; Rusciano@thearc.org; wakschlag@thearc.org; dlang@gravitystack.com; jtolbert@gravitystack.com; Jean.Gill@bexar.org; lisa.cubriel@bexar.org; lroberson@bexar.org; maryann.ortegon@bexar.org; Noelle.Butler@bexar.org; Barbara.Nicholas@dallascounty.org; ben.stool@dallascounty.org; cecily.fazzino@dallascounty.org; Jason.Schuetter@dallascounty.org; kim.barr@dallascounty.org; attorney@rodriguezfirm.com; eric.nichols@butlersnow.com; mckenna.tansey@butlersnow.com; Victoria.Giese@butlersnow.com; jacqueline.bauerband@harriscountytexas.gov; jonathan.fombonne@harriscountytexas.gov; sameer.birring@harriscountytexas.gov; tiffany.bingham@harriscountytexas.gov; josephine.ramirez@da.co.hidalgo.tx.us; leigh.tognetti@da.co.hidalgo.tx.us; jacqueline.villarreal@da.co.hidalgo.tx.us; michaelj.garza@da.co.hidalgo.tx.us; gabe.hodge@traviscountytexas.gov; Leslie.dippel@traviscountytexas.gov; patrick.pope@traviscountytexas.gov; tony.nelson@traviscountytexas.gov; jclebel@cooley.com; dlouk@cooley.com; ghabell@cooley.com; jpalaganas@cooley.com; khartnett@cooley.com; kspector@cooley.com; mejiab@cooley.com; nfelsen@cooley.com; oarmon@cooley.com; christine@statesuniteddemocracy.org; marina@statesuniteddemocracy.org; ranjana@statesuniteddemocracy.org; robert@statesuniteddemocracy.org;

Paikowsky, Dana (CRT)

From: Nina Perales <nperales@MALDEF.org>
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Subject: [EXTERNAL] Re: LUPE v. Texas, No. 5:21-cv-844-XR - Jonathan White Declaration

cetroberts@jonesday.com; lcapozzi@jonesday.com; scrosland@jonesday.com; skenny@jonesday.com;
jmgore@jonesday.com

Subject: RE: LUPE v. Texas, No. 5:21-cv-844-XR - Jonathan White Declaration

Counsel,

State Defendants will agree to make Mr. Jonathan White available for deposition on Friday, August 11th, for a topic-limited deposition. We propose that the deposition start at 9:00 a.m. CDT, with three hours of on-record time. Mr. White has a hard stop at 2:30 p.m. CDT. He will testify, as at trial, only as to his personal knowledge and experience. Included below are State Defendants' responses to DOJ's proposed topic list:

Topic 1: *Disclosure of any open allegations or cases of voter fraud referenced in Mr. White's declaration, including the details of each instance, the means by which they were detected and investigated, the source(s) of any referral to the OAG, and the outcome of each case;*

Response: State Defendants agree that Mr. White may be asked about public information related to active investigations or cases of voter fraud. The Plaintiffs may ask about case details that they can demonstrate are public using public records or produced discovery. State Defendants do not agree that Mr. White may be asked about non-public information related to active investigations or cases.

Topic 2: *Disclosure of new details about any closed allegations or cases of voter fraud referenced in Mr. White's declaration, including the details of each instance, the means by which they were detected and investigated, the source(s) of any referral to the OAG, and the status of each case;*

Response: State Defendants agree that Mr. White may be asked about any closed investigation and case of voter fraud, the details of that case, the investigative methods used in that case, and the source of referral of that case.

Topic 3: *OAG's search for and production of documents relevant to topics 1-2, and its search for and production of documents related to any allegations or cases of voter fraud featuring similar fact patterns or legal theories to those referenced in topics 1-2;*

Topic 7: *OAG's search for and production of documents relevant to paragraphs 25-30 and 33-36 of Mr. White's declaration.*

Response: Mr. White may be asked about any search for or production of documents he personally conducted or directed. Mr. White is unable to testify as to the gathering of documents by any other employee of the OAG and that is beyond the scope of the deposition. Mr. White will also not testify regarding any attorney-client conversations he had with other OAG attorneys, or any work product he created related to this litigation.

Topic 4: *Disclosure of the information regarding OAG's investigative techniques and methods in paragraphs 25-30 and 33-36 of Mr. White's declaration;*

Response: State Defendants agree that Mr. White may be questioned regarding the OAG's investigative techniques and methods in these paragraphs, as long as the questions pertain to his personal knowledge and experience.

Topic 5: *Disclosure of any allegations or cases of voter fraud, whether open or closed, on which Mr. White relied in forming his opinions regarding the adequacy of investigative techniques and tools in paragraphs 25-30 and 33-36 of Mr. White's declaration;*

Response: State Defendants agree that Mr. White may be questioned regarding any of the OAG's investigative techniques and tools in these paragraphs, as long as the questions pertain to his personal knowledge and experience with investigative techniques and tools on closed cases, or on active cases following the same procedure as in Topic 1.

Topic 6: *Disclosure of any other facts considered in forming Mr. White's opinions regarding the adequacy of investigative techniques and tools in paragraphs 25-30 and 33-36 of Mr. White's declaration; and*

Response: State Defendants agree that Mr. White may be questioned about his personal opinions and beliefs on the adequacy of investigative techniques and tools that are based on his general knowledge and experience not otherwise excluded from these Topics as described above.

Ultrasensitive Documents:

Our office has conferred with the Secretary of State's office on the five ultrasensitive documents you wish to use at trial. The Secretary of State's office will agree to permit the use of four of the documents being used, with minor redactions. The Secretary of State's office did have concerns about STATE087194 being used without substantial redactions. Documents of this type are never posted on the Secretary of State's website and are never produced in response to public records requests or otherwise shared with members of the public. This document contains a vast amount of information that goes to the integrity of the TEAM system. The Secretary of State's office cannot agree to this document being used without a level of redaction that may make it unfit for your use. If you still would like to proceed with use of STATE087194, we can schedule a meet & confer to discuss how you intend to use this document and the necessary redactions. However, an agreement as to the other four documents with the necessary redactions should not be an issue.

Zachary W. Berg

Special Counsel

Office of the Texas Attorney General

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Austin, Texas 78701

512.936.1808

From: Paikowsky, Dana (CRT) <Dana.Paikowsky@usdoj.gov>

Sent: Tuesday, August 8, 2023 8:49 AM

To: Stewart, Michael (CRT) <Michael.Stewart3@usdoj.gov>; Will Wassdorf <Will.Wassdorf@oag.texas.gov>; Kathleen Hunker <Kathleen.Hunker@oag.texas.gov>; Nina Perales <nperales@MALDEF.org>; Zachary Berg <Zachary.Berg@oag.texas.gov>; Jameson Joyce <Jameson.Joyce@oag.texas.gov>; Ryan Kercher <Ryan.Kercher@oag.texas.gov>; Ethan Szumanski <Ethan.Szumanski@oag.texas.gov>; David Bryant <David.Bryant@oag.texas.gov>; Johnathan Stone <Johnathan.Stone@oag.texas.gov>; Sharon Murray <Sharon.Murray@oag.texas.gov>; Jessica Yvarra <Jessica.Yvarra@oag.texas.gov>

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Subject: RE: LUPE v. Texas, No. 5:21-cv-844-XR - Jonathan White Declaration

Counsel,

The United States writes a second time to follow up on our July 31, 2023, correspondence proposing topics for a limited re-deposition of Mr. White and seeking additional information to allow us to resolve this dispute.

As we have repeatedly warned, the window to resolve this issue is short and closing. The United States must be allowed to redepose Mr. White—and obtain any other late-disclosed or late-waived evidence it is entitled to—not only in advance of trial, but also with sufficient time to allow the parties to file motions in limine seeking additional relief if warranted by the August 22, 2023, deadline set by the Court. That deadline is now just two weeks away. The requested deposition must also occur sufficiently in advance of that deadline to allow the court reporter reasonable time to complete a transcript. State Defendants have yet to provide the United States with any information needed to move forward with a negotiated resolution, including suggested dates and times for Mr. White's deposition. Given the deadlines ahead, the United States respectfully requests that Mr. White be made available for a deposition no later than August 14, 2023.

The United States also awaits the State's reply as to its position on the use of ultrasensitive documents at trial. We are happy to meet and confer on this issue if that would help move things forward.

Thank you very much.

Dana Paikowsky

From: Paikowsky, Dana (CRT)

Sent: Thursday, August 3, 2023 10:53 AM

To: Stewart, Michael (CRT) <Michael.Stewart3@usdoj.gov>; Will Wassdorf <Will.Wassdorf@oag.texas.gov>; Kathleen Hunker <Kathleen.Hunker@oag.texas.gov>; Nina Perales <nperales@MALDEF.org>; Zachary Berg <Zachary.Berg@oag.texas.gov>; Jameson Joyce <Jameson.Joyce@oag.texas.gov>; Ryan Kercher <Ryan.Kercher@oag.texas.gov>; Ethan Szumanski <Ethan.Szumanski@oag.texas.gov>; David Bryant <David.Bryant@oag.texas.gov>; Johnathan Stone <Johnathan.Stone@oag.texas.gov>; Sharon Murray <Sharon.Murray@oag.texas.gov>; Jessica Yvarra <Jessica.Yvarra@oag.texas.gov>

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Subject: RE: LUPE v. Texas, No. 5:21-cv-844-XR - Jonathan White Declaration

Counsel,

We write to follow up again on the issue of Mr. White's testimony. The time to finalize our pretrial record is short and trial is fast approaching. Please let us know the answers to the questions we posed, any concerns you may have about the list of topics for Mr. White's re-deposition, and possible dates for such deposition.

We would be happy to meet and confer to discuss anything further, too. Please just let us know of your availability.

Best,
Dana Paikowsky

From: Stewart, Michael (CRT) <Michael.Stewart3@usdoj.gov>

Sent: Monday, July 31, 2023 4:39 PM

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Subject: RE: LUPE v. Texas, No. 5:21-cv-844-XR - Jonathan White Declaration

Counsel,

Thank you for your continued willingness to resolve this issue. While we disagree with your assertion that our prior communications did not provide information regarding the topics on which additional discovery is appropriate, in the interest of avoiding the need for judicial intervention and because the time left to resolve this issue before trial is short, we attempt here to provide additional information. LUPE Plaintiffs, who have also been part of these discussions, may also wish to weigh in. Given that we have not yet received a substantive response from the State regarding what it would accept as to the scope of a remedial deposition, nor any response regarding documents related to these topics, we hope this additional information will enable the State to timely and substantively respond.

First, we believe that any renewed deposition of Mr. White should permit inquiry into the topics raised by his declaration:

1. Disclosure of any open allegations or cases of voter fraud referenced in Mr. White's declaration, including the details of each instance, the means by which they were detected and investigated, the source(s) of any referral to the OAG, and the outcome of each case;
2. Disclosure of new details about any closed allegations or cases of voter fraud referenced in Mr. White's declaration, including the details of each instance, the means by which they were detected and investigated, the source(s) of any referral to the OAG, and the status of each case;

3. OAG's search for and production of documents relevant to topics 1-2, and its search for and production of documents related to any allegations or cases of voter fraud featuring similar fact patterns or legal theories to those referenced in topics 1-2;
4. Disclosure of the information regarding OAG's investigative techniques and methods in paragraphs 25-30 and 33-36 of Mr. White's declaration;
5. Disclosure of any allegations or cases of voter fraud, whether open or closed, on which Mr. White relied in forming his opinions regarding the adequacy of investigative techniques and tools in paragraphs 25-30 and 33-36 of Mr. White's declaration;
6. Disclosure of any other facts considered in forming Mr. White's opinions regarding the adequacy of investigative techniques and tools in paragraphs 25-30 and 33-36 of Mr. White's declaration; and
7. OAG's search for and production of documents relevant to paragraphs 25-30 and 33-36 of Mr. White's declaration.

Second, in order to inform our discussions and determine the adequacy of a remedial deposition, we respectfully request your response to some additional issues raised in the course of our discussions:

1. Do you intend to use Mr. White's testimony at trial to opine on the adequacy of certain investigation mechanisms based on his expertise as a law enforcement official? As we have noted in prior communications, Mr. White was never disclosed as an expert, and opinion testimony based on his expertise would not be admissible. Please confirm whether you agree Mr. White's testimony is limited to that of a lay witness under FRE 701—that is, matters he has personally perceived, as opposed to opinions based on his specialized knowledge.
2. The State's July 18 email referenced the "need to ensure than any questioning does not invade privileged information" with respect to "investigative methods." As we've noted, this dispute turns in large part on Mr. White's opinions expressed in his declaration regarding the adequacy of investigative methods, and the assertion of privilege to block inquiry into those methods at Mr. White's deposition (as described on p. 4 of our July 14 letter). Accordingly, in order to proceed toward a potential resolution, we respectfully request that the State detail how it intends to assert privilege over any inquiries into investigative methods at a renewed deposition. Given the short time to reach resolution here and our mutual interest in not setting up a futile deposition, we believe a "wait and see" approach is not tenable.

Finally, we request that you propose dates when Mr. White will be available for a deposition.

As we have stated previously, we are participating in these discussions and this deposition without prejudice to our ability to seek further relief for late disclosure or privilege waiver.

Thank you,
Mike

From: Will Wassdorf <Will.Wassdorf@oag.texas.gov>

Sent: Thursday, July 27, 2023 4:19 PM

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Subject: [EXTERNAL] RE: LUPE v. Texas, No. 5:21-cv-844-XR - Jonathan White Declaration

Dana:

We disagree that there has been any late-stage disclosure or privilege waiver with respect to Mr. White. We believe that our position has been consistent throughout this litigation regarding what information is privileged from discovery, including in Mr. White's deposition and declaration. We understand that you disagree. At the hearing, Judge Rodriguez appeared to be sensitive to both side's concerns. Accordingly, we are willing to work with you to resolve these issues. One option that has been discussed is a limited deposition of Mr. White to allow you to obtain the information you believe you are entitled to. However, before we can agree to that limited deposition, both parties need to understand the scope of that deposition. As only you know what additional information you are seeking in that deposition, you are in the best position to propose topics for deposition. Neither your July 14th letter, nor the emails below, move us toward that goal. At best, those correspondence might aid in identifying the points of disagreement but do little to identify topics for a limited deposition to resolve those points of disagreement. Broadly speaking, it appears you are seeking information on: (1) Closed cases and the investigative techniques utilized; (2) General procedure of how cases were received by Election Integrity and referred to counties for prosecution; (3) Additional information on some issues raised in Mr. White's declarations; and (4) Publicly-available Information on active cases. If you will propose a list of specific topics for deposition, we can confer on those issues.

With respect to the confidential documents you identified, use of those documents at trial should be acceptable with redaction of Personally Identifiable Information. We are still conferring internally with respect to the ultrasensitive documents and will get back to you as soon as possible.

Sincerely,

William D. Wassdorf

Assistant Attorney General

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Sent: Thursday, July 27, 2023 8:08 AM

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Subject: RE: LUPE v. Texas, No. 5:21-cv-844-XR - Jonathan White Declaration

Counsel,

We write today to follow up our July 20, 2023, correspondence regarding the Parties' ongoing negotiations to resolve the issues raised by the White Declaration. As we previously explained, we are unable to make progress without a clear sense of State Defendants' position on the underlying issues and proposed solution here. The time to negotiate and implement a remedy is short. The Parties are well on their way to finalizing the pretrial record in this case, with our pretrial disclosure deadline coming up this Friday, motion in limine deadline less than four weeks away, and our pretrial conference shortly thereafter. The United States has already been prejudiced by State Defendants' late-stage disclosures and privilege waiver, which appears to require complex additional discovery in a short window before trial. That prejudice only compounds the longer we wait for a negotiated solution. Thus, we ask that State Defendants provide us with a response as soon as possible.

Relatedly, the United States would like to reiterate its repeated requests to confer with State Defendants regarding the use of certain documents marked confidential and ultrasensitive in our exhibits and at trial.

We appreciate State Defendants' continued cooperation in resolving these matters as efficiently as possible in advance of trial.

Best,
Dana Paikowsky

From: Paikowsky, Dana (CRT)

Sent: Thursday, July 20, 2023 1:02 PM

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Subject: RE: LUPE v. Texas, No. 5:21-cv-844-XR - Jonathan White Declaration

Counsel,

The United States appreciates State Defendants' willingness to work with us to resolve this dispute without motion practice. We share that goal.

As an initial matter, and as the United States explained in our July 14, 2023, letter, we believe State Defendants consistently prevented the Parties from obtaining meaningful discovery on two topics that they later broached in Mr. White's declaration: (1) non-public information regarding voter fraud investigations and prosecutions, both concluded and ongoing; and (2) non-public information regarding investigative tools and techniques. In that letter, the United States detailed specific paragraphs in the White declaration that we believe constituted belated disclosure, late waiver of previously made privilege assertions, or both, and provided State Defendants with numerous record and legal citations supporting our position.

Having laid out our position in our previous letter and having received no indication of why we would be entitled only to something narrower, the United States respectfully requests that State Defendants propose a list of deposition topics that they believe would fairly resolve this issue. We also request a clear statement of the scope of the privilege you are asserting and contend that you have not waived. We are concerned in particular with your assertion that some of the areas of inquiry identified in our letter would be subject to renewed assertions of privilege, given that our concerns were expressly tied to information disclosed by Mr. White in his declaration. To the extent State Defendants rely on Mr. White's opinion regarding the adequacy of investigative tools and procedures, they have voluntarily placed that at issue, and any proposed resolution that does not permit robust exploration into that assertion would only compound the existing prejudice. With both parties' positions on waiver and late disclosure made clear, we believe all parties will have the information we need to work productively towards a solution.

The United States also respectfully renews our request that State Defendants identify and produce any documents related to the two topics identified in our letter that were withheld or otherwise not produced during discovery, and which are relevant either to the United States' requests for production or to defenses State Defendants intend to raise at trial. At a minimum, any materials relevant to the cases discussed in the White declaration, and on which he may have relied, should have been produced during discovery, if not in advance of his deposition. This is true for both public and non-public information. *See Martino v. Kiewit New Mexico Corp.*, 600 F. App'x 908, 910–11 (5th Cir. 2015) ("[E]ven if a document is publicly available or in the opposing party's possession, a party must still disclose it under Rule 26(a)(1)(A) to provide notice of evidence central to its claims or defenses."); *see also Shatsky v. Syrian Arab Republic*, 312 F.R.D. 219, 223–24 (D.D.C. 2015) (collecting cases). But, as explained in our letter, despite conducting a secondary review of the OAG's document productions and searching the public record, the United States was unable to locate documents substantiating

many of the declaration's assertions. If State Defendants' position is that no such documents exist, please confirm that position for us in writing.

Finally, we would like to make clear that the United States cannot currently agree that additional discovery will suffice as a complete remedy. The prejudice of requiring us to conduct additional and truncated discovery into these new assertions by Mr. White in the narrow window before trial, and well after the close of two rounds of discovery in this prolonged case, is plain. Accordingly, we reserve our right to seek exclusion of this newly disclosed factual material should we not be able to resolve this dispute.

Thank you very much, again, for your consideration and assistance in this matter. We look forward to hearing from you soon.

Best,
Dana Paikowsky

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Sent: Tuesday, July 18, 2023 2:28 PM

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Subject: [EXTERNAL] RE: LUPE v. Texas, No. 5:21-cv-844-XR - Jonathan White Declaration

Counsel,

Pursuant to Judge Rodriguez's instructions at the July 11, 2023 hearing, State Defendants are prepared to present Mr. Jonathan White for a limited deposition as a means of resolving this dispute. We therefore ask that you please identify the specific topics you wish to investigate, and where you thought State Defendants' assertions were overbroad, out-of-place, or in conflict with Mr. White's June 22, 2023, declaration.

You address two topics in your July 14, 2023, letter: non-public information regarding closed cases and non-public information about investigative tools and techniques. The description in your letter is insufficiently general to inform any potential agreement on potential topics of inquiry for a limited deposition of Mr. White. If you could focus more tightly into specific areas of inquiry, it might be easier to potentially reach an agreement on a topic list. This is especially true when it comes to investigative methods, as we need to ensure that any questioning does not invade privileged information. The more focused the proposed topics, the sooner we can reach an agreement.

State Defendants continue to maintain our objection to the disclosure of non-public information related to ongoing criminal investigations. And we are unaware of any such information included in Mr. White's June 22, 2023, declaration could act to waive that objection.

State Defendants disagree with the suggestion on page 4 of your July 14, 2023, letter that they had a duty to gather and produce publicly available information and court documents regarding the case of Mr. Mohamed. We also disagree that the facts in *Orchestrate HR, Inc. v. Trombetta*, 178 F. Supp. 3d 476, 508 (N.D. Tex. 2016) are analogous. The United States is equally aware of Mr. Mohamed's case and has equal access to court documents. The United States independently pursued discovery of this case at Frank Phillips' March 31, 2023, deposition. Mr. Mohamed's prosecution is being handled by the Denton County District Attorney's office. Counties, many of whom are parties in this action, remain the best available source of information on election crimes, as State Defendants do not have original jurisdiction to prosecute these crimes.

Kathleen Hunker

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Sent: Friday, July 14, 2023 3:52 PM

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Subject: RE: LUPE v. Texas, No. 5:21-cv-844-XR - Jonathan White Declaration

Counsel,

Please find attached a letter in response to State Defendants' request for more detailed information about the United States' concerns about the Jonathan White Declaration. We hope this is helpful, and we appreciate your continued willingness to work with us to resolve this issue. Please let us know when you are available to meet and confer to discuss at your earliest convenience.

Best,
Dana Paikowsky

From: Nina Perales <nperales@MALDEF.org>

Sent: Monday, July 10, 2023 2:26 PM

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Subject: [EXTERNAL] Re: LUPE v. Texas, No. 5:21-cv-844-XR - Jonathan White Declaration

Counsel for State Defendants,

LUPE Plaintiffs plan to join today's meet and confer regarding the newly-filed Jonathan White declaration. We believe that in addition to the paragraphs identified in Ms. Paikowsky's email below, more paragraphs should be withdrawn because the testimony relies on information that was requested but not previously disclosed in discovery.

As described in our Reply filed Friday, the White declaration waives the investigative privilege with respect to a number of documents described on the OAG privilege logs. The declaration purports to describe in detail the techniques employed in “a variety of offenses related to voter fraud, including but not limited to ballot harvesting, illegal voting, and illegal ballot assistance.” id. ¶ 6. The testimony is based on information learned in OAG’s investigations regarding alleged fraud related to mail ballots (id. ¶¶ 11, 17-22, 25, 30, 31, 35, 42, 46), vote harvesting (id. ¶¶ 12, 13, 24, 26, 27, 28, 29, 32, 34, 37, 38, 39, 44, 45), in-person voter assistance (id. ¶ 11), and other election-related issues (id. ¶ 16)—all information contained in the documents withheld by OAG.

In addition to the declaration paragraphs identified above, LUPE Plaintiffs believe that declaration paragraphs 3, 7, 8, 9, 10, 14, 15, 23, 33, 36, 41, and 43 also should be withdrawn because they contain testimony based on information that should have been produced in discovery.

Thank you and we look forward to speaking further at 3pm Central.

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Subject: RE: LUPE v. Texas, No. 5:21-cv-844-XR - Jonathan White Declaration

That time works for the United States. Here is a Zoom link: <https://www.zoomgov.com/j/16191158462>

Thanks very much.

Dana Paikowsky

From: Zachary Berg <Zachary.Berg@oag.texas.gov>

Sent: Monday, July 10, 2023 10:31 AM

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Subject: [EXTERNAL] RE: LUPE v. Texas, No. 5:21-cv-844-XR - Jonathan White Declaration

Counsel,

State Defendants are available today for a meet & confer at 3 p.m. CDT. If this time still works for the United States, would you kindly circulate a Zoom link? Thank you.

Best,

Zach Berg

From: Paikowsky, Dana (CRT) <Dana.Paikowsky@usdoj.gov>

Sent: Sunday, July 9, 2023 1:36 PM

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Subject: RE: LUPE v. Texas, No. 5:21-cv-844-XR - Jonathan White Declaration

Counsel,

We appreciate your response. The United States believes it would be helpful to meet to discuss these issues on Monday, July 10, 2023, in advance of the upcoming hearing to consider Private Plaintiffs' motion to compel certain documents withheld under these privileges. Please advise us of your availability. We are happy to meet at whatever time works for best for you all (except 10-11 am CDT).

Thank you very much, again, for your time and consideration.

Best,
Dana Paikowsky

From: Zachary Berg <Zachary.Berg@oag.texas.gov>

Sent: Friday, July 7, 2023 7:12 PM

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Subject: [EXTERNAL] RE: LUPE v. Texas, No. 5:21-cv-844-XR - Jonathan White Declaration

Counsel,

State Defendants have reviewed your July 6, 2023, email and would respectfully like to clarify certain things. We have not made blanket assertions of investigative privilege over all documents related to criminal investigations of election crimes, or even all “communications concerning criminal conduct related to the 2022 general election.” Each document over which privilege has been asserted has been reviewed individually by an attorney. We have produced documents related to closed criminal investigations that are responsive to discovery requests unless those documents were otherwise privileged. State Defendants have asserted investigative privilege only over non-public information related to pending criminal investigations. That is a clear standard, easily differentiated from *Bright Harvest*, where a party selectively chose to waive attorney-client privilege on certain helpful documents. *Bright Harvest Sweet Potato Co., Inc. v. H.J. Heinz Co., L.P.*, 2015 WL 1020644, at *2 (D.Idaho, 2015).

Furthermore, State Defendants’ position is based on common law, not the result of a “common understanding” between County Defendants and the United States. We have also asserted other privileges, such as attorney-client privilege, attorney work-product, and legislative privilege, consistent with our understanding of common law.

Of the paragraphs the United States wishes State Defendants to strike from the June 22, 2023, declaration of Mr. Jonathan White, paragraphs 13, 25, and 30-33 do not relate to active criminal cases. Paragraphs 18-23 relate to the case of Zul Mirza Mohamed, who was charged with over one hundred felonies related to mail ballot application fraud and mail ballot fraud during the 2020 elections. This remains a pending criminal case in Denton County. However, all information in paragraphs 18-23 of Mr. White’s declaration is public, either in the search warrant filed in Denton County or in the numerous news articles about Mr. Mohamed’s alleged crimes (Mr. Mohamed’s case drew considerable public attention). The United States is aware of these news articles and used two as exhibits during its deposition of Denton County Elections Administrator Frank Phillips. See, e.g., Phillips Dep. (March 31, 2023) at 18:12-26:9, 26:10-29:6, 31:22-25. Furthermore, Private Plaintiffs have previously argued that communications did not contain privileged information when they are “little more than the Attorney General sharing results of past investigations into allegations of voting misconduct . . . merely conveying data or details about a past election complaint is not providing a legal opinion or service.” See ECF 391 at 20-21.

State Defendants are not aware of any facts in Mr. White’s declaration regarding open cases that were not already public. Should you have knowledge or belief that Mr. White’s declaration incorporates a specific document or fact withheld under a privilege, we could have a more concrete conversation to alleviate your potential concerns. Non-privileged facts, even related to ongoing criminal investigations, can appropriately remain in Mr. White’s declaration. The United States further had the opportunity to question Mr. White at his April 27, 2022, 30(b)(1) deposition and his May 5, 2022, 30(b)(6) deposition, regarding his general thoughts on election integrity.

Lastly, it is surprising that you would propose the “exclusion of any information previously withheld or otherwise covered by investigatory privilege, attorney-client privilege, or attorney work-product doctrine.” This would exclude investigative documents where the privilege fell off after a criminal investigation was closed. State Defendants are also not trying to waive privilege on documents where it would otherwise apply, so it is unclear why you think such a remedy is needed, or how the present situation would be factually similar to *Bright Harvest*. In addition, your proposal seems to cover any previously withheld documents produced by State Defendants at the United States’ and Private Plaintiffs’ insistence. It is unclear why you would have gone through that exercise if you did not think those documents were potentially helpful. Further, it is unclear what grounds you would have to exclude information that State Defendants have disclosed either through good faith discussions with plaintiffs or through

privilege falling off. Because State Defendants are not seeking to introduce documents at trial that would be otherwise privileged, and the Federal Rules already cover what evidence may be presented at trial, State Defendants would need more information before discussing modification of those Rules.

Best regards,

Zachary W. Berg

Special Counsel

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Subject: LUPE v. Texas, No. 5:21-cv-844-XR - Jonathan White Declaration

Counsel,

The United States writes to respectfully request that State Defendants strike paragraphs 13, 18-23, 25, and 30-33 from the declaration of Jonathan White to remove reference to any information previously withheld or otherwise covered by investigatory, attorney-client, or attorney work-product privilege from the record.

The parties in this case, including County Defendants, State Defendants, and the United States, consistently invoked investigatory or law enforcement privilege, attorney-client privilege, and attorney work-product doctrine to protect non-public information about voter fraud investigations and prosecutions from disclosure. *See, e.g.*, State Def. Response to US Second Set of RFPs at 22-24 (explaining that “Defendant[s] [] consider[] any documents related to open investigations and prosecutions to be privileged”); White Dep. (April 27, 2022) at 185:14-186:24, 187:7-188:20; Ingram Dep. (April 28, 2022) at 156:11-157:4; Def. Travis County DA Response to OCA-GH First Set of ROGs at 2. Consistent with this common understanding, State Defendants and other parties not only declined to disclose details of investigations and prosecutions that had yet to be both publicly and finally resolved—as well as information about investigatory methods and prosecutorial decision-making—they also structured their inquiries so as to avoid eliciting such information. *See, e.g.*, White Dep. (April 27, 2022) at 45:5-11, 53:2-11, 89:9-90:6; Adkins Dep. (July 20, 2022) at 184:21-185:14; Garza Dep. (May 9, 2022) at 87:22-88:13; Def. Dallas County DA Response to LULAC First Set of ROGs at 3-4.

As the Texas Office of the Attorney General reiterated in its objections to private plaintiffs’ requests for production seeking communications concerning criminal conduct related to the 2022 general election: “The release of non-public information related to these files would invariably reveal the identity of suspects, witnesses, and reporting parties, thereby compromising ongoing investigation. The release of this information also bears the risk compromising future investigations to the extent it reveals law enforcement’s methods and tactics for detecting and investigating election fraud offenses.” Def. OAG Response to LUPE Second Set of RFPs at 6, 8, 10-11, & 13.

State Defendants cannot selectively and belatedly waive this privilege after discovery has closed and just two months before trial. It is well established that parties are prohibited from using privilege “as both a sword and a shield,” meaning State Defendants may not invoke privilege to prevent disclosure of evidence and bar cross examination on these subjects during discovery only to “selectively reveal [] those portions of the privileged communications most beneficial to its case” on the eve of trial. *Bright Harvest Sweet Potato Co. v. H.J. Heinz Co., L.P.*, No. 1:13-CV-296, 2015 WL 1020644, at *1 (D. Idaho Mar. 9, 2015); *see also In re Itron, Inc.*, 883 F.3d 553, 558-60 (5th Cir. 2018). Given the nature of State Defendants’ late-waiver and related disclosures, parties would need significant additional discovery to correct this information asymmetry. Thus, exclusion of any information previously withheld or otherwise covered by investigatory privilege, attorney-client privilege, or attorney work-product doctrine is appropriate to prevent prejudice to the parties.

Please let us know if you have questions or concerns. We would be happy to schedule a meet and confer to discuss as soon as possible to ensure we can resolve this issue before the summary judgment reply deadline.

Best,
Dana Paikowsky

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